



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

COURT (CHAMBER)

CASE OF SCHÖNENBERGER AND DURMAZ v. SWITZERLAND

(Application no. 11368/85)

JUDGMENT

STRASBOURG

20 June 1988

In the case of Schönenberger and Durmaz*,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr. R. RYSSDAL, *President*,
Mr. J. CREMONA,
Mrs. D. BINDSCHEDLER-ROBERT,
Mr. L.-E. PETTITI,
Sir Vincent EVANS,
Mr. R. BERNHARDT,
Mr. J. DE MEYER,

and also of Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 26 February and 24 May 1988,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") and by the Government of the Swiss Confederation ("the Government") on 13 March and 13 April 1987 respectively, within the three-month period laid down in Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 11368/85) against Switzerland lodged with the Commission under Article 25 (art. 25) by a Swiss national, Mr. Edmund Schönenberger, and a Turkish national, Mr. Mehmet Durmaz, on 10 January 1985.

The Commission's request referred to the declaration whereby Switzerland recognised the compulsory jurisdiction of the Court (Article 46) (art. 46) and to Articles 44 and 48 (art. 44, art. 48); the Government's application referred to Articles 45, 47 and 48 (art. 45, art. 47, art. 48). Both sought a decision from the Court as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 8 (art. 8). The Commission also sought a decision under Article 10 (art. 10).

* Note by the Registrar. The case is numbered 4/1987/127/178. The second figure indicates the year in which the case was referred to the Court and the first figure its place on the list of cases referred in that year; the last two figures indicate, respectively, the case's order on the list of cases and of originating applications (to the Commission) referred to the Court since its creation.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicants stated that they wished to take part in the proceedings. The President of the Court gave Mr. Schönenberger leave to appear on his own behalf, while Mr. Durmaz designated the lawyer who would represent him (Rule 30).

3. The Chamber to be constituted included ex officio Mrs. D. Bindschedler-Robert, the elected judge of Swiss nationality (Article 43 of the Convention) (art. 43), and Mr. R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 23 May 1987, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr. L.-E. Pettiti, Sir Vincent Evans, Mr. R. Bernhardt, Mr. A. M. Donner and Mr. J. De Meyer (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43). Subsequently, Mr. J. Cremona, substitute judge, replaced Mr. Donner, who was unable to attend (Rules 22 § 1 and 24 § 1).

4. Mr. Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and, through the Registrar, consulted those who would be appearing before the Court on the need for a written procedure (Rule 37 § 1). In accordance with the order made in consequence on 7 August 1987, the Registrar received the Government's memorial on 21 September 1987 and the applicants' memorial on 7 October. On 19 November, the Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. Having consulted - through the Registrar - the Agent of the Government, the Delegate of the Commission and the applicants, the President directed on 1 December 1987 that the oral proceedings should commence on 22 February 1988 (Rule 38). On 15 January 1988, he gave Mr. Schönenberger and his assistant leave to plead in German (Rule 27 § 3).

6. The hearing was held in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

- for the Government

Mr. O. JACOT-GUILLARMOD, Head

of the Department of International Affairs, Federal Department of
Justice, *Agent,*

Mr. R. LEVI, former federal judge,

Mr. B. MÜNGER, Federal Department of Justice, *Counsel;*

- for the Commission

Mr. S. TRECHSEL, Delegate;

- for Mr. Schönenberger

Mr. E. SCHÖNENBERGER, Rechtsanwalt, *Applicant;*

Ms. B. HUG, Rechtsanwältin, *Assistant;*

- for Mr. Durmaz, applicant

Mr. J.-P. GARBADE, avocat, *Counsel.*

The Court heard addresses by Mr. Jacot-Guillarmod and Mr. Levi for the Government, Mr. Trechsel for the Commission and Mr. Schönenberger, Ms. Hug and Mr. Garbade for the applicants, as well as their replies to its questions.

At the hearing, the Commission, the Government and the applicants lodged with the registry various documents, either at the President's request or on their own initiative.

AS TO THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The first applicant, Edmund Schönenberger, who is a Swiss citizen born in 1942, practises as a Rechtsanwalt (lawyer) in Zürich.

The second applicant, Mehmet Durmaz, who is a Turkish national born in 1950, lives at Onex, in Switzerland. He is a taxi-driver.

A. Stopping of a letter and enclosure from Mr. Schönenberger to Mr. Durmaz

8. On 16 February 1984, acting on a statement by one O, the district prosecutor (Bezirksanwalt) for Pfäffikon (Canton of Zürich) issued a warrant for Mr. Durmaz's arrest, in connection with suspected offences under federal legislation relating to the misuse of drugs.

The applicant was arrested on the same day by the Geneva police and taken to Zürich the following day, where he was questioned for the first time by officials from the prosecutor's office. He was further questioned and also confronted with other suspects on 23 and 24 February, and on each occasion he cooperated by answering all the questions put to him.

9. Mr. Durmaz's wife, who had been informed of the arrest on 16 February, spoke on the telephone to the Pfäffikon district prosecutor on 20 and 24 February. On these occasions she asked him whether her husband had a lawyer. He replied that he had not but added that he would take care of it. She also wrote to her husband on 21 and 24 February. In the second letter, which reached him on 28 February, she expressed the hope that the "lawyer" - whose name she did not mention - "would look after [him]". On 24 February, she asked Mr. Schönenberger to take charge of Mr. Durmaz's defence.

The first applicant immediately called the district prosecutor to advise him and to say that he would be sending authorisation forms and a letter. Also, on 24 February, he sent a letter and enclosure to the district

prosecutor's office, as required by the relevant legislation, requesting the district prosecutor to forward them to the addressee.

The enclosure comprised a copy of the covering letter to the district prosecutor, two forms giving authority to act and a letter to Mr. Durmaz, which read as follows (translation from the German):

"Sir,

I am instructed by your wife to undertake your defence. You will find enclosed two forms giving me authority to act for you. If you wish to authorise me to represent you, please send one of the forms to the district prosecutor and return the other one to me (duly signed).

It is my duty to point out to you that you are entitled to refuse to make any statement. Anything you say may be used in evidence against you. If you choose to remain silent, the district prosecutor will have to prove your guilt by other means (witnesses, etc.). He will usually then try to influence you by arguing that in that case you will remain in custody on remand until such time as he has questioned witnesses, other suspects, etc. If this does not worry you (i.e. a possible prolongation of your detention on remand), it will be to your advantage to exercise your right not to make any statement.

Once I have received your authority to act, I shall apply for permission to visit you and will come and see you. At all events, be patient: you will have to be released at some stage!

Yours faithfully ..."

10. The district prosecutor probably received the letter and enclosure for Mr. Durmaz on Monday 27 February, but kept them from him without telling him that he had received them. On the same day, he asked Mr. Durmaz to choose a lawyer. Mr. Durmaz, being unable to pay for one, applied for the only Zürich lawyer he knew, Mr. Garbade, to be assigned officially to him; the presiding judge of the Pfäffikon District Court duly appointed Mr. Garbade on 1 March.

11. In an order made on 1 March, the prosecutor's office decided not to communicate to Mr. Durmaz the letter and forms which were intended for him. It did so on the following ground (translation from the German):

"As long as Edmund Schönenberger is not the suspect's authorised legal representative, the general provisions of the Prisons Ordinance [see paragraph 18 below] apply to him. Section 53(3) prohibits the forwarding of letters concerning the preparation of a case for trial. In the present letter, Edmund Schönenberger has recommended to the suspect a particular course of conduct for the preparation of the case. In virtue of the aforementioned provision, his letter will therefore not be forwarded."

The prosecutor's office returned to Mr. Schönenberger the said documents together with the copy of the covering letter.

12. On various dates between 5 and 23 March 1984, Mr. Durmaz was again questioned and confronted with other suspects. He also received visits

from Mr. Garbade. On 8 March, Mr. Garbade had asked the presiding judge of the District Court to offer Mr. Durmaz the possibility of choosing between Mr. Schönenberger and himself as his defence lawyer. The two lawyers had a conversation on 9 March, as a result of which they agreed that Mr. Garbade would continue to assist Mr. Durmaz and that Mr. Schönenberger would challenge the order made on 1 March (see paragraphs 14 to 16 below).

13. Mr. Durmaz was freed on 23 March 1984. On 29 May 1985 the Zürich district prosecutor ordered that he had no case to answer as it could not be excluded beyond all possible doubt that someone else had been mistaken for him. In respect of his detention on remand, the prosecutor awarded him 3,000 Swiss francs (CHF) which the Zürich District Court increased to 3,565 CHF on 30 October 1985.

B. The appeals against the Pfäffikon district prosecutor's order of 1 March 1984

14. The applicants lodged two appeals against the order of 1 March 1984 (see paragraph 11 above); the first of these was rejected by the Department of Justice of the Canton of Zürich on 19 March 1984, and the second was dismissed by the presiding judge of the Pfäffikon District Court on 11 April 1984.

15. On 7 April 1984, they lodged a public-law appeal with the Federal Court against the decision of the Department of Justice; they alleged an infringement of the federal Constitution and of the Convention. During the proceedings they stated that they did not propose to challenge the dismissal of their second appeal.

16. In a judgment on 20 June, which was notified on 6 November 1984, the Federal Court allowed the appeal in part.

It noted in the first place that Mr. Schönenberger could not rely on the privileges conferred on prisoners' defence lawyers under section 53(3) of the Prisons Ordinance. The Federal Court added that the prosecutor's office had not infringed either the Constitution or the Convention by intercepting Mr. Schönenberger's letter to Mr. Durmaz, since it related to pending criminal proceedings and gave the addressee advice on the behaviour to adopt during the investigation.

On the other hand, the Federal Court held that the decision to withhold the two authorisation forms and the copy of the covering letter to the prosecutor's office was contrary to the Constitution: since these documents did not relate to pending criminal proceedings, section 53(3) could not be relied on in respect of them. The Federal Court also pointed out that a person who has been charged with a criminal offence is at all times entitled to ask for a lawyer and to receive a form for giving authority to act. It concluded that the disputed measure was a disproportionate restriction on

freedom of correspondence and on the rights of the defence. It consequently set aside the Department of Justice's decision and awarded the applicants costs of 500 CHF.

II. NATIONAL LEGISLATION AND CASE-LAW

17. According to the general principles of criminal procedure, a suspect is under no obligation to make any statements. The Federal Court has held that, under the Constitution, he has the right to remain silent and that he cannot normally be held to have culpably obstructed the proceedings on the sole ground that he has refused to reply to questions, unless there has been some abuse of the right (Judgments of the Swiss Federal Court, vol. 106 (1980), part I a), p. 8, and vol. 109 (1983), part I a), p. 169).

18. In the Canton of Zürich, the monitoring of correspondence with persons in custody is governed by section 53 of the District Prisons Ordinance of 19 April 1972 (*Verordnung des Kantons Zürich vom 19. April 1972 über die Bezirksgefängnisse*), which was made under section 73 of the law of 6 July 1941 by which the Swiss Criminal Code was enacted.

Section 53(3) reads as follows (translation from German):

"No correspondence with co-prisoners and former co-prisoners (except for close relatives) shall be allowed. Letters jeopardising the purpose of detention or prison security shall not be forwarded; letters relating to pending criminal proceedings shall be forwarded only if they form part of correspondence with a defence lawyer. A prisoner shall be informed if a letter is not forwarded."

19. In 1973, the Federal Court considered the constitutionality of various provisions of the Zürich Ordinance of 1972. As regards the restrictions on freedom of correspondence, it noted the following (translation from German):

"Section 53 lays down in particular that letters 'whose content is improper' or which relate to pending criminal proceedings shall not be forwarded. Correspondence with co-prisoners or former co-prisoners is likewise prohibited. On the other hand, communications addressed to supervising authorities or to a defence lawyer are not subject to any restrictions.

The applicant alleges that prohibiting communications 'whose content is improper' goes much too far and leaves too great a discretion to the officials responsible for monitoring correspondence. In his submission, the prohibition should apply only to communications whose content is 'illicit'. This change of wording would make no appreciable difference, since the second concept is likewise very imprecise in the present context. The applicant does not dispute the need to prohibit the dispatch of letters with a particular type of content, and that is the very purpose of the monitoring. It is clear, therefore, that any correspondence which might assist in the preparation of escape plans or the commission of fresh criminal offences, or which could have an impermissible influence on criminal proceedings (danger of collusion) must be prohibited. Even assuming that it is in principle desirable to maintain contacts with the outside world, these contacts must not compromise the purpose of detention. Moreover, the supervising authorities must also be given the right to hold back any

communications which might jeopardise order in the prison. Conversely, the authorities cannot refuse to forward communications which do not jeopardise either the purpose of detention or order in the prison and which are permissible in their quantity (s. 52). It is accordingly of little consequence whether or not the supervising authority approves the content of such communications (cf., on the legal situation in Germany, the Federal Constitutional Court's decision of 14 March 1972, vol. 33, no. 1). It is not possible to make an accurate general statement of where the line should be drawn, since it depends on the particular circumstances of each case. The general principle laid down in the disputed ordinance accordingly cannot be criticised as being unconstitutional, at least not if regard is had to the fact that correspondence with the supervising authorities and defence lawyers is not subject to any marked degree of control." (Judgments of the Swiss Federal Court, vol. 99, part I a), pp. 288-289)

PROCEEDINGS BEFORE THE COMMISSION

20. The applicants applied to the Commission on 10 January 1985 (application no. 11368/85). They claimed that the Pfäffikon district prosecutor's stopping of the letter from Mr. Schönenberger to Mr. Durmaz had violated their right to respect for their correspondence (Article 8 of the Convention) (art. 8) and their freedom of expression (Article 10) (art. 10).

21. The Commission declared the application admissible on 4 March 1986. In its report of 12 December 1986 (made under Article 31) (art. 31), the Commission expressed the unanimous opinion that there had been a breach of Article 8 (art. 8) and that no separate issue arose under Article 10 (art. 10). The full text of the Commission's opinion is reproduced as an annex to this judgment.

CONCLUDING SUBMISSIONS BY THE GOVERNMENT

22. At the hearing, the Government confirmed the submissions contained in their written pleadings. In them they invited the Court

"to conclude that in the present case the non-forwarding of the letter in issue addressed by the first applicant to the second applicant, who was detained on remand and did not know the sender of the letter, did not constitute a violation of Article 8 (art. 8) of the Convention or of any other provision of that instrument".

AS TO THE LAW

I. THE ALLEGED BREACH OF ARTICLE 8 (art. 8)

23. The applicants' complaint against the competent Swiss authorities is not that they apprised themselves of the contents of the letter from Mr. Schönenberger to Mr. Durmaz but that they did not forward the letter to its addressee. According to them this measure was in breach of Article 8 (art. 8) of the Convention which provides that:

"1. Everyone has the right to respect for ... his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

The Government refute this argument whilst the Commission agrees with it.

24. It is common ground as between those appearing before the Court that there was "interference" by a public authority in the exercise of the right to respect for correspondence, guaranteed by paragraph 1 (art. 8-1). Moreover, none of them disputed that the interference was "in accordance with the law". It is otherwise with regard to the question whether the interference satisfied the two further requirements of paragraph 2 (art. 8-2), that is to say pursued one of the aims set out in that provision and was "necessary in a democratic society".

25. The applicants express doubts as to the first-mentioned requirement, but the Court shares the opinion of the Commission and the Government that the stopping of the letter by the Pfäffikon district prosecutor had as its aim "the prevention of disorder or crime". In accordance with the Court's case-law, the pursuit of this objective may "justify wider measures of interference in the case of a ... [convicted] prisoner than in that of a person at liberty" (see the Golder judgment of 21 February 1975, Series A no. 18, p. 21, § 45). The same reasoning may be applied to a person, such as Mr. Durmaz, being held on remand and against whom inquiries with a view to bringing criminal charges are being made since in such a case there is often a risk of collusion.

26. As to the second requirement, both the Commission and the applicants consider that it was not satisfied in this case; the Government argue that it was so satisfied.

27. The Court points out that, to be necessary in a democratic society, an interference must be founded on a pressing social need and, in particular, be proportionate to the legitimate aim pursued (see, as the most recent precedent, the Olsson judgment of 24 March 1988, Series A no. 130, p. 31, § 67).

28. To support their argument that the contested stopping of the letter was necessary the Government rely in the first place on the contents of the letter in issue: according to the Government, it gave Mr. Durmaz advice

relating to pending criminal proceedings which was of such a nature as to jeopardise their proper conduct.

The Court is not convinced by this argument. Mr. Schönenberger sought to inform the second applicant of his right "to refuse to make any statement", advising him that to exercise it would be to his "advantage" (see paragraph 9 above). In that way, he was recommending that Mr. Durmaz adopt a certain tactic, lawful in itself since, under the Swiss Federal Court's case-law - whose equivalent may be found in other Contracting States - it is open to an accused person to remain silent (see paragraph 17 above). Mr. Schönenberger could also properly regard it as his duty, pending a meeting with Mr. Durmaz, to advise him of his right and of the possible consequences of exercising it. In the Court's view, advice given in these terms was not capable of creating a danger of connivance between the sender of the letter and its recipient and did not pose a threat to the normal conduct of the prosecution.

29. Above all, the Government emphasise that the letter was not sent by a lawyer who had been instructed by Mr. Durmaz.

The Court attaches little importance to this fact, having regard to the circumstances, which were that Mr. Schönenberger was acting on the instructions of Mrs. Durmaz and had moreover so apprised the Pfaffikon district prosecutor by telephone on 24 February 1984 (see paragraph 9 above). These various contacts amounted to preliminary steps intended to enable the second applicant to have the benefit of the assistance of a defence lawyer of his choice and, thereby, to exercise a right enshrined in another fundamental provision of the Convention, namely Article 6 (art. 6) (see, *mutatis mutandis*, the aforementioned Golder judgment, Series A no. 18, p. 22, § 45). In the circumstances of the case, the fact that Mr. Schönenberger had not been formally appointed is therefore of little consequence.

30. In the result, the contested interference was not justifiable as "necessary in a democratic society"; consequently it was in breach of Article 8 (art. 8).

II. THE ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

31. Before the Commission, the applicants also alleged a breach of their freedom of expression, guaranteed by Article 10 (art. 10).

In its report, the Commission gave as its opinion that no separate issue arose on this point. The Court agrees with this opinion which is in line with its own case-law (see the *Silver and Others* judgment of 25 March 1983, Series A no. 61, p. 41, § 107). Neither the persons concerned nor the Government sought to challenge this opinion in argument before it.

III. THE APPLICATION OF ARTICLE 50 (art. 50)

32. The applicants seek just satisfaction both for pecuniary and non-pecuniary damage and for costs and expenses. They rely on Article 50 (art. 50) which is in the following terms:

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Pecuniary damage

33. Mr. Schönenberger seeks damages for the loss of fees he would have received had Mr. Durmaz been able to instruct him (*lucrum cessans*). He puts the amount of lost fees at 2,735 CHF, which were the fees paid to Mr. Garbade by the Zürich authorities (see paragraph 10 above). For his part, Mr. Durmaz claims 450 CHF for loss of earnings occasioned by his coming to Strasbourg for the hearing on 22 February 1988 (see paragraph 6 above).

34. With regard to the claims made by the first applicant, the Court shares the opinion of the Commission's Delegate to which the Government also subscribe: even if Mr. Durmaz had received the letter in issue, there is nothing to prove that he would have instructed Mr. Schönenberger to act in his defence. Moreover, it is common ground between the three persons concerned that Mr. Garbade continued to assist the second applicant after 9 March 1984 (see paragraph 12 above).

As regards Mr. Durmaz, the Court construes his claim as a request for reimbursement of the expenses he incurred in travelling to Strasbourg: it will deal with these below (see paragraphs 37 and 38).

B. Non-pecuniary damage

35. The applicants also seek compensation for non-material loss. Mr. Schönenberger places this at 1,500 CHF and justifies it by the damage suffered, according to him, by his reputation and his professional standing. As for Mr. Durmaz, he leaves it to the Court to fix the amount.

36. The contested stopping of the letter may have obstructed the applicants and aroused in them a certain feeling of frustration, but not to the extent of requiring an award of damages; the finding of a violation of Article 8 (art. 8) in itself constitutes adequate just satisfaction in this respect (see, *mutatis mutandis* the Silver and Others judgment of 24 October 1983, Series A no. 67, p. 6, § 10).

C. Costs and expenses

37. Mr. Schönenberger claims an amount of 3,820 CHF for costs and expenses - a detailed list of which he also furnished - in respect of the proceedings conducted in Switzerland and then before the Convention institutions up to and including the submission of his memorial to the Court; for the hearing of 22 February 1988, he requests 150 CHF per hour but does not specify the number of hours worked by himself or by his assistant.

For his part, Mr. Durmaz seeks 3,450 CHF in respect of lawyers' fees relating to the proceedings before the Court, calculated on the basis of twenty-three hours at 150 CHF per hour, plus 450 CHF in connection with his appearance in Strasbourg in February 1988 (see paragraph 34 above). On this last point the Court recalls that, under the terms of Rules 30 and 33 § 3 (d) of the Rules of Court, the individual applicants may take part in the proceedings under certain conditions which were met in this case. Furthermore, their presence in the court-room offers the undeniable advantage of enabling the Court to ascertain on the spot their view on issues affecting them (see, as the most recent precedent, the Lingens judgment of 8 July 1986, Series A no. 103, p. 30, § 54).

38. On the basis of the incomplete information in its possession, the observations of those appearing before it and its own case-law in this area (see, as the most recent precedent, the Belilos judgment of 29 April 1988, Series A no. 132, pp. 27-28, § 79), the Court, making an equitable determination, awards to the first applicant 3,820 CHF in respect of the costs of proceedings in Switzerland and then in Strasbourg until the submission of his memorial in October 1987 and 2,500 CHF for the hearing of 22 February 1988 and to the second applicant 2,500 CHF for Mr. Garbade's services before the Court and 250 CHF for the second applicant's travelling and subsistence expenses.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a breach of Article 8 (art. 8) of the Convention;
2. Holds that no separate issue arises under Article 10 (art. 10);
3. Holds that the defendant State shall pay to Mr. Schönenberger and Mr. Durmaz the amounts of 6,320 (six thousand three hundred and twenty) Swiss francs and 2,750 (two thousand seven hundred and fifty) Swiss francs respectively.
4. Dismisses the remainder of the claims for just satisfaction.

Done in English and in French and delivered at a public hearing in the Human Rights Building, in Strasbourg, on 20 June 1988.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar